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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EVERARD C. CALL and BETH S. CALL,
Petitioners,

vs.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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103PP

QUESTIONS PRESENTED

Defendant governmental agencies working in concert sold to petitioners municipal bonds in order to construct public improvements. Certain real property (hereinafter referred to as "Parcel 351") was pledged as security in case of nonpayment on the bonds. Thereafter, these agencies, including the respondent California Tahoe Regional Planning Agency ("hereinafter CTRPA'), retroactively used their zoning powers to make Parcel 351 worthless and to deny to Parcel 351 all use of the public improvements which were built for use by Parcel 351 and the adjoining subdivisions.

1. Does such conduct violate Article I, Section 10, Clause 1 of the United States Constitution as an impairment of the obligation of contract?

2. Does such conduct violate the Fifth and Fourteenth Amendments to the

United States Constitution as a taking of property for public use without just compensation and without due process of law or as a denial of equal protection of the laws?

3. Can the doctrine of res judicata be expanded to transform a California Court of Appeals decision (Call v. Feher, 93 Cal. App. 3rd 387, 155 Cal. Rptr. 397 (1979)) on the petitioner-bondholders' ordinary foreclosure action against the original landowners for nonpayment of the bond into a decision upholding the power of governmental agencies to deny bondholders' constitutional rights?

4. Can California governmental agencies by the use of their zoning powers override the clear principles set forth in this Court's landmark decision in United States Trust Co. v. New Jersey?[1/]

1/ There were no parties, other than the petitioners and respondent CTRPA, to the proceeding in the Court of Appeal whose (footnote continued)

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(footnote continued from previous page) judgment is sought to be reviewed. However, the California Regional Water Quality Control Board, Lahontan Region, and the Tahoe Regional Planning Agency were also named and served as defendants.

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Cases

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Agins v. City of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979), aff'd, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed 2d 106 (1980)	57
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Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)	52

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Brown v. Felsen, 442 U.S. 127, 60 L. Ed. 2d 767, 99 S. Ct. 2205 (1979)	48
Call v. Feher, 93 Cal. App. 3d 387, 155 Cal. Rptr. 397 (1979)	6, 13, 15, 16, 17, 18, 19, 20, 22, 44, 46, 47, 50, 51, 56, 57
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Chase National Bank v. City of Norwalk, 291 U.S. 431, 54 S. Ct. 475, 78 L. Ed. 894 (1934)	48
City of Zephyrhills, Florida v. R.E. Crummer & Co., 237 F. 2d 338 (5th Cir. 1956)	26
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Coombes v. Getz, 285 U.S. 434, 52 S. Ct. 435, 76 L. Ed. 866 (1932)	23
Creighton v. Pragg, 21 Cal. 115 (1862)	33

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Energy Reserves Group, Inc. v. Kansas Power and Light Co., ____ U.S. ____, 103 S. Ct. 697, 74 L. Ed. 569 (1983)	28
Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810)	27
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Home Bldg. & L. Assn. v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934)	25
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Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982)	41
Louisville Joint Stock Bank v. Radford, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593 (1934)	37
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Martino v. Santa Clara Valley Water District, 703 F. 2d 1141 (9th Cir. 1983)	38
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Murray v. Charleston, 96 U.S. 432, 24 L. Ed 760 (1877)	25
Myles Salt Co. v. Iberia Drainage District, 239 U.S. 478, 36 S. Ct. 204, 60 L. Ed. 392 (1915)	40
Neary v. Peterson, 1 Cal. 2d 703, 37 P. 2d 82 (1934)	37
Northwestern Nat. Life Ins. Co. v. Jordan, 447 F. Supp. 856 (D. Nev. 1978)	32
Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency, 632 F. 2d 104 (9th Cir. 1980)	32

TABLE OF AUTHORITIES CITED

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	Page(s)
Norwood v. Baker, 172 U.S. 269, 19 S. Ct. 187, 43 L. Ed. 443 (1898)	40
Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)	38
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Scotland County Court v. United States, 140 U.S. 41 (1891)	24

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	Page(s)
Scudder v. Greendale, 704 F. 2d 999 (7th Cir. 1983)	43
Selby v. Oakdale Irrigation Dist., 140 Cal. App. 171, 35 P. 2d 125 (1934)	33
Shouse v. Quinley, 3 Cal. 3d 357, 45 P. 2d 70 (1935)	33
Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944)	42
Societe Internationale v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)	52
Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal. 3d 296, 152 Cal. Rptr. 902, 591 P. 2d 1 (1979)	55
Superior Sav. Ass'n v. City of Cleveland, 501 F. Supp. 1244 (N.D. Ohio 1980)	26
Sutter Basin, 40 Cal. 2d 235, 253 P. 2d 649 (1953)	54
Thibodo v. United States, 187 F. 2d 249 (9th Cir. 1951)	37

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	Page(s)
United States Trust v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977)	23, 25, 26, 27, 28, 33, 34 55, 56
Valdez v. Cory, 139 Cal. App. 3d 773, 189 Cal. Rptr. 212 (1983)	23
Viso v. State of California, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (1979)	43
Vitek v. Jones, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980)	52
Von Hoffman v. Quincy 4 U.S. (Wall) 535, 18 L. Ed. 403 (1867)	24, 25
W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 79 L. Ed. 1298, 55 S. Ct. 555 (1935)	26, 31
Westborough Mall, Inc. v. City of Cape Giradeau, 532 F. Supp. 284 (E.D. Mo. 1981)	43
Western Union Telegraph Co. v. Pennsylvania R.R., 195 U.S. 540, 25 S. Ct. 133, 49 L. Ed. 312 (1904)	42

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Wilson v. Beville, 47 Cal. 2d 852, 306 P. 2d 789 (1957)	47

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Other Authorities	
Comment, "Alteration of Rights in California Public Securities," 53 California Law Review 1081 (1965)	53
Comment, "How Not to Contest Special Assessments in California," 17 Stanford Law Review, 256 (1965)	56
Comment, "The Contract Clause: Is There Life After Death" 30 Baylor Law Review 191 (1978)	53
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Holliman, "Development Agreements and Vested Rights in California," 13 The Urban Lawyer 44 (1981)	22
Thomas R. Hurst, "Municipal Bonds and the Contract Clause: Looking Beyond United States Trust Company v. New Jersey," 5 Hastings Constitutional Law Quarterly 25 (1978)	53, 54
McQuillan, Municipal Corporations, §§43.122 and 43.141, pp 691, 736	33
18 Wright & Miller, Federal Practice & Procedure, §4461, p. 543 (1981)	48

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

EVERARD C. CALL and BETH S. CALL,

Petitioners,

v.

CALIFORNIA TAHOE REGIONAL
PLANNING AGENCY,

Respondent.

Petition for Writ of Certiorari to the
Court of Appeal of the State of
California,
Third Appellate District

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Everard C. Call and Beth S. Call, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate District, entered in the above-entitled case on February 23, 1984.

I.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Third Appellate District is unreported and printed in Appendix A hereto. (A1 - A16). The judgment of the Superior Court of the State of California in and for the County of Placer is printed in Appendix A hereto. (A17 - A23).

II.

JURISDICTION

The judgment, printed in Appendix A hereto, which is sought to be reviewed was entered on February 23, 1984. A hearing in the California Supreme Court was denied on May 23, 1984.

The jurisdiction of the Supreme Court is invoked under Section 1257(3) of Title 28 of the United States Code. This petition is timely filed under Section 2101(c) of Title 28 of the United States Code.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions which petitioners contend have been violated by the actions of respondent CTRPA and its co-defendants are Article I, Section 10 of the United States Constitution, commonly known as the "Contract Clause," which

provides in part as follows:

> No State shall ... pass any ... law impairing the obligation of contracts ..."

This case also involves the following clauses of the Fifth Amendment:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

and the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves Section 5.13 of

the Land Use Ordinance of the California Tahoe Regional Planning Agency (hereinafter referred to as "CTRPA"), the text of which is included in Appendix B hereto.

IV.

STATEMENT OF THE CASE

This case concerns governmental land use restrictions which have unconstitutionally impaired contractual obligations and taken for public use without compensation the security for a street improvement bond issued by the County of Placer, State of California, and purchased by the petitioners. The security for the petitioners' bond was a parcel of land situated within the Kingswood West Assessment District in Placer County, and known as Assessment number 351 (hereinafter referred to as "Parcel 351").

The principal questions raised by this

petition concern the future integrity of municipal finance in California and the profound effect which the Court of Appeals decision, if not reversed, will have on the rights of municipal bondholders. In this case, the Court of Appeal misapplied the doctrine of res judicata by concluding that its adjudication of a prior action (a second amended cross-complaint) brought by landowners (not petitioners) against the California Tahoe Regional Planning Agency (hereinafter "CTRPA") in Call v. Feher, 93 Cal. App. 3d 387, 155 Cal. Rptr. 397 (1979) (in which cross-complaint the petitioners were not even involved), completely bars the petitioners' complaint against CTRPA. The effect of this decision is to preclude the petitioners, the same bondholders whose bond foreclosure rights had been upheld in Call v. Feher, from even bringing suit for the total elimination of their security for

the bond upon which they foreclosed and in complete disregard of the bondholder contract with the County of Placer (the issuing entity).

This decision leaves unsettled important questions of law. This case is one of first impression as to: (1) the right of municipal bondholders to recover damages for the taking of the security for their bonds; (2) the power of one governmental unit to use the zoning power to relieve another governmental unit of its specific financial obligations; (3) the right of bondholders to their security interest in real property after they have perfected title to that security; and (4) the application of the res judicata doctrine to preclude bondholders from litigating their constitutional rights relating to their security.

Summary of Facts

a. Constitutional issues

Since the trial court decided this case on demurrer, the following facts must be taken as true:[2]

(1) All the defendant governmental agencies acted in concert and conspired to confiscate petitioners' property for public use, so that the act of one agency is the act of all. (CT, p. 4, lns. 10-14; p. 11, lns. 26-28; p. 22, lns. 23-28)

(2) Petitioners entered into a contract with defendant Placer County of the State of California.[3]

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[2] Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 622, 70 S. Ct. 392, 393, 94 L. Ed. 393, 396 (1950); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 511, 125 Cal. Rptr. 365, 367, 543 P. 2d 237 (1975).

[3] The petitioners' complaint states:

> At all times enumerated herein, there existed by virtue of Defendant County's resolutions, activities and conduct, including the forming of the said Defendant Assessment District and

(footnote continued)

(3) Petitioners' contract with Placer County was breached by defendants and respondents acting in concert.[4]

(footnote continued from previous page)
construction of Improvements pursuant thereto, a contract, expressed or implied, between Plaintiffs and Defendant County to benefit the subject property and to assure that the subject property continues as security for said issuance of Bond 343, as a publicly prescribed residential subdivisible property under the zoning and land use laws of Defendant County, and its policies, declarations and conduct in further consideration of Plaintiff's purchase of the bonds in the face amount of $98,867.54 (CT, p.15, lns. 24-28; p. 16, lns. 1-3).

[4] The Complaint states:

> The adoption of said [land use] moratoria and the enforcement, by judicial procedure and otherwise, as well as moratoria on the issuance of sewer permits and the refusal of Defendant County to allow Plaintiffs to proceed with development for lawfully prescribed residential uses, and the Defendant County's attempt to sell said property at a tax sale, constitute a
> (footnote continued)

(4) Petitioners' sole security for the payment of their bond was rendered worthless by defendants' and respondent's actions. (CT p. 15, lns. 6-15).

In 1970, the Placer County Board of Supervisors established the Kingswood West Assessment District to construct certain public improvements and to issue special assessment bonds to pay the costs thereof. (Clerk's Transcript [hereinafter "CT"], p. 4, lns 20-21, p. 5, lns. 5-11) The public improvements to be constructed by Placer County included a system of sewers, roads, drainage facilities, concrete dikes, street and traffic control signs, and underground power and telephone facilities. (CT, p. 4, lns 21-27) Placer County ("county") issued the bonds pursuant to the Improvement Act of 1911

(footnote continued from previous page)

> breach of the express or implied contract described above.

(CT p. 16, lns. 11-15).

(Sts. & Hy,. Code §§ 5000 et seq.)[5/] and the Municipal Improvement Act of 1913 (Sts. & Hy. Code §§10000 - 10609). Each bond was a direct lien upon each of the respective parcels in the assessment district. (CT, p. 7, lns. 8-14) The county sold bond number 343 to the appellants in April 1971 (CT, p. 4, ln. 18) and agreed to construct the

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5/ The Improvement Act of 1911 (Stats 1911, Ch. 397), upon which petitioners' rights are predicated, provided for the issuance of bonds secured by assessments levied to pay for local improvements. The assessment is a first lien upon the property affected until the bond is fully paid. Sts. & Hy. Code §6446. If the bond is not paid, the bondholder may commence a judicial foreclosure preceding. Sts. & Hy. Code §6610. After judgment of foreclosure and order of sale, the sheriff is instructed to sell the property to the highest bidder. Sts. & Hy. Code §6615. In the event there are no bidders, and there were none in this case, a certificate of sale for the entire lot or parcel of land described in the bond is issued to the bondholder. If the bond is not redeemed, the bondholder becomes entitled to receive a deed which conveys to the grantee "the absolute title to the lands described therein...free of all encumbrances" with certain specified exceptions. Sts. & Hy. Code §6555.

improvements. The petitioners made a substantial financial commitment by paying $98,867.54 for the entire bond. It was understood and agreed by petitioners and the county that since the bond was an "acreage" bond not secured by an individual lot that the county would allow the property to be subdivided so as to make use of the public improvements. (CT, p. 5, lns. 1-5, p. 6, lns. 1-4, p. 15, lns. 24-28, p. 16, lns. 1-3). The petitioners' bond was directly secured by the parcel of 30+ acres of land known as Assessment number 351, which is the subject of this action ("Parcel 351"). (CT, p. 4, lns. 18-19, p. 7, lns. 27-28). The improvements were constructed and sized to service Parcel 351 upon its subdivision. (CT, p. 6, lns. 5-7). The special benefits for which the petitioners paid formed a key part of the security for their bond.

In September 1975, respondent California Tahoe Regional Planning Agency ("CTRPA") enacted its Land Use Ordinance (hereinafter "Ordinance") which prohibited, under certain defined circumstances, the subdivision of Parcel 351. Respondent CTRPA and its co-defendants, Placer County, the Tahoe Regional Planning Agency ("TRPA") and other agencies participated in the drafting and planning of the Ordinance. (CT, p. 10, lns. 11-15) CTRPA also obtained an injunction against the county which enjoined the county from considering or allowing the subdivision of Parcel 351. (CT, p. 10, lns. 15-22).

In January 1976, the owners of Parcel 351 ("landowners") defaulted in the payment of principal and interest on the petitioners' bond. Appellants filed a bond foreclosure complaint in June 1976. After considerable proceedings (Call v.

Feher, 93 Cal. App. 3d 434, 155 Cal. Rptr. 387 (1979)), the petitioners finally completed the foreclosure and took title to Parcel 351 after no buyers bid on the land at a sheriff's sale.

As a result of the conspiracy of the aforementioned public agencies, petitioners acquired title to worthless security (i.e., the "regulated" land). (CT, p. 10, lns. 23-26, p. 11, lns. 10-25, p. 12, lns. 11-19, p. 15, lns. 6-7) The petitioners' efforts to develop, sell, rent, otherwise use, or obtain relief from the restrictions on the property have been unsuccessful. (CT, p. 12, lns. 25-28) Since the bond-financed, public improvements were constructed, the land is only fit for residential subdivision. (CT, p. 9, lns. 6-11). Parcel 351 is now burdened with traffic, sewer lines, utility lines and drainage facilities from which the property has never derived any

benefit whatsoever. However, residential use and subdivision is prohibited by governmental edict to this day, even though Parcel 351 is surrounded by residential subdivisions. (CT, p. 14, lns. 27-28, p. 15, ln. 1). In the meantime, petitioners are liable for payment of continuing assessments to Parcel 351. Petitioners have received nothing of benefit in exchange for financing improvements which have been operational for over a decade.

b. Procedural history

Petitioners' complaint in this action was dismissed by the California courts on the grounds that a prior foreclosure action, Call v. Feher, supra, was res judicata on the issues raised in this action.

The petitioner-bondholders were only involved in the foreclosure action against the landowners in Call v. Feher.

As a response to petitioners' foreclosure complaint in the prior action, the landowners filed (in March 1977), a cross-complaint against petitioners and CTRPA. The cross-complaint asked for a declaratory judgment that: (1) the petitioners had no right to foreclose the assessment bond; (2) the landowners had a vested right to subdivide the land; and (3) the CTRPA Ordinance was unconstitutionally vague. Thus, petitioners and CTRPA were both cross-defendants. Petitioners and respondent CTRPA did not actually oppose each other and litigate issues adverse to each other in Call v. Feher.

The petitioners demurred generally to the cross-complaint in April 1977, and the trial sustained the demurrer with leave to amend. Later in April the court granted petitioners' motion to sever the bond foreclosure action from the cross-

complaint. In June 1977, petitioners were dismissed with prejudice from the cross-complaint. Thereafter, petitioners were not parties to the landowners' action for declaratory relief. The Calls never participated in the landowners' cross-complaint against CTRPA.[6/]

In November 1977, the landowners filed a second amended cross-complaint only against CTRPA (not petitioners), on further "vested right" theories, i.e., to develop Parcel 351 by reason of the preliminary steps which had been made toward subdivision before the adoption of the subdivision restrictions in the CTRPA Ordinance. The court held the landowners

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6/ It was extremely difficult for the trial and the appellate courts to understand how unrelated procedurally and substantively the CTRPA and foreclosure actions were. The complete separation of the Calls' foreclosure action and the landowners' cross-complaint is better illustrated by the chart of the Call v. Feher litigation in petitioners' petition for hearing before the California Supreme Court.

failed to exhaust their administrative remedies to rezone Parcel 351.

No objections were raised in the proceedings as to the propriety of the assessment against the subject property, the validity of the bond and its issuance, petitioners' bond ownership, and the foreclosure procedures under the Streets and Highway Code. Petitioners, moreover, were not parties to the adjudication regarding the landowners' claim for declaratory relief. The trial court had severed the foreclosure action in May, 1977, and petitioners had been dismissed from the last cross-complaint more than seven months prior to CTRPA's successful demurrer.

The Court of Appeal in Call v. Feher, after consolidating appeals by the landowners from the foregoing decisions (over the petitioners' objections), upheld the summary judgment in the petitioners'

foreclosure action and the judgment of dismissal in favor of CTRPA. Call v. Feher, supra, at 446, 155 Cal. Rptr. at 393.

The resolution of those issues against the landowners in no way affected the favorable resolution of petitioners' complaints to foreclose.

How the Federal Questions Were Raised Below

Petitioners, in their Complaint asserted that the land use moratoria and ordinances enacted retroactively by the defendants, and the refusal to allow development of Parcel 351 constituted impairment of the contract between the petitioner-bondholders and defendant Placer County in violation of the Contract Clause of the United States Constitution and that the actions of respondent and its co-defendants constituted a taking of the petitioner-bondholders' promised source of

security for repayment of the monies lent (i.e., Parcel 351), the improvements built thereon and the vested development rights therein without payment of just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution.

The Superior Court sustained respondent's demurrer to the Complaint on the ground that petitioners' claims were barred by the doctrine of res judicata, and specifically by the judgment in the prior decision of Call v. Feher which held that "the obligations under the bond were not relieved." (A22).

The Court of Appeal affirmed for substantially the aforementioned reasons and there was "no controversy here as to the impairment of any contract or bond obligation." (A8). Petitioners' petition for hearing before the California Supreme Court was denied on May 23, 1984. (A-24)

V.

REASONS FOR GRANTING THE WRIT

A.

A state may not use its police power retroactively and unilaterally to impair special assessment bondholders' contractual and constitutional rights under the Contract Clause of the United States Constitution.

The present case concerns the integrity of the state's financial obligations, and whether or not respondent CTRPA's elimination of the petitioners' bond contract rights was constitutionally warranted. This case is one of first impression. It is not a case of adjusting opposing landowner and governmental interests in open space zoning, but will determine whether land use restrictions passed by one governmental body (CTRPA), in concert with another governmental agency, can be used to relieve the other governmental unit (Placer County), contrary to its agreements, of its

specific financial, contractual obligations. Significantly, the prior action of Call v. Feher never reached the issue whether one governmental agency is permitted to make a promise to entice investment in municipal bonds, only to have another arm of government repudiate that promise when it regulates land use through the exercise of its "police power." See Holliman, "Development Agreements and Vested Rights in California," 13 The Urban Lawyer 44 (1981).

In affirming the judgment in favor of CTRPA, the appellate court precluded petitioners from obtaining a full and fair hearing on their constitutional rights, in spite of the federal and state courts' longstanding protection of municipal bondholders' rights from subsequent contractual impairment by legislative act. This court should, therefore, grant a writ

of certiorari in this case.

Article I., Section 10, Clause 1 of the United State Constitution provides: "No State shall ... pass any ... law impairing the obligation of contracts." The California Constitution contains a parallel proscription. (Art. I, §9). Under well settled principles, these contract clauses limit the power of a state to modify its own contracts with other parties. United States Trust v. New Jersey, 431 U.S. 1, 17, 97 S. Ct. 1505, 52 L. Ed. 2d 92, 106 (1977); Valdez v. Cory, 139 Cal. App. 3d 773, 189 Cal. Rptr. 212, 220 (1983). The meaning and application of a state statute that is challenged as violating the contracts clause is a question of federal law. Coombes v. Getz, 285 U.S. 434, 441, 52 S. Ct. 435, 436, 76 L. Ed. 866 (1932); see American Toll Bridge Co. v. Railroad Comm'n, 307 U.S. 486, 489, 59 S. Ct. 948, 951, 83 L. Ed.

1414 (1939); Rapid Transit Corp. v. New York, 303 U.S. 573, 593, 58 S. Ct. 721, 731, 82 L. Ed. 1024 (1938).

Since the nineteenth century, this Court has held that once legally authorized municipal obligations are outstanding, a legislature cannot impair the terms protecting creditors' rights to payment when due. Scotland County Court v. United States, 140 U.S. 41, 46-47 (1891); Ralls County Court v. United States, 105 U.S. 733, 735-736 (1881). These early cases establish a fundamental doctrine of municipal bond law: the power to raise taxes or whatever revenues are pledged for the payment of principal or interest on debt obligations imposes a trust on the municipality to honor the terms of payment which cannot be impaired. Von Hoffman v. Quincy 4 U.S. (Wall) 535, 550, 18 L. Ed. 403 (1867); 6 Fordham Urban Law Journal 1, 15 (1977). Strict

compliance with the terms of public contracts is necessary. Murray v. Charleston, 96 U.S. 432, 24 L. Ed 760 (1877). The bondholders' contract would be worthless and would represent only abstract rights if the municipality were free to excuse itself. Von Hoffman v. Quincy, supra, 4 U.S. at 555. A promise in a contract that gives to one party the power "to deny or change the effect of the promise is an absurdity." United States Trust Co. v. New Jersey, 431 U.S. at 25 n. 23, 97 S. Ct. at 1519 n. 23 (quoting Murray v. Charleston, supra.). Moreover, the laws under which public bonds are issued become a part of the contract between the bondholders and the issuing authority. Home Bldg. & L. Assn. v. Blaisdell, 290 U.S. 398, 429-430, 54 S. Ct. 231, 78 L. Ed. 413, 423-424 (1934). No change in these laws may be permitted to "cut down the security" of the bond

obligation. W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 60, 79 L. Ed. 1298, 1301, 55 S. Ct. 555 (1935).

These concepts -- that a municipal bond confers upon the bondholder certain specific rights of security for a debt as well as the right not to have the security impaired remain valid today. Superior Sav. Ass'n v. City of Cleveland, 501 F. Supp. 1244, 1248 (N.D. Ohio 1980). The assessment bond issued by Placer County and purchased by petitioners formed a binding contract. City of Zephyrhills, Florida v. R.E. Crummer & Co., 237 F. 2d 338, 341 (5th Cir. 1956).

The case which supports the granting of the instant petition for certiorari, is United States Trust v. New Jersey (hereinafter "U. S. Trust"). In that case, this Court formulated the general rule that the police power does not permit a modification of the terms securing

payment under a contract entered into under the municipality's spending, borrowing and taxing powers. U. S. Trust, supra, at 19, 52 L. Ed. 2d at 108) (legislation which retroactively repealed a statutory bond covenant eliminated an important security provision and, thus, unconstitutionally impaired the obligation of the state's contract with the plaintiff-bondholders). 7/

7/ U. S. Trust was one of the long line of cases stretching back to Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810), addressing efforts by the states to repudiate by subsequent legislation their own contractual undertakings. Despite early deference to such legislation, the Court in U. S. Trust applied a higher standard of scrutiny to state abrogations of their own contractual arrangements than to state efforts to modify purely private agreements. The Court reasoned that when the state is a party to the contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." 431 U.S. at 26, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112. In these cases, the Court held, it would apply a more exacting standard of scrutiny, examining whether "a less

(footnote continued)

The indisputable facts of this case satisfy the three-step analysis required by U. S. Trust. (Energy Reserves Group, Inc. v. Kansas Power and Light Co., ____ U.S. ____, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)):

1) Contract "substantially impaired." Petitioners were promised subdivisible and improved land as security for their bond. That promise was absolutely necessary to induce the petitioners and the investing public to purchase improvement bonds and lend their funds to Placer County. Petitioners' contractual relationship with the county was absolutely repudiated by respondent (and other land use agencies in the Tahoe area), when respondent denied all reasonable and beneficial uses of

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(footnote continued from previous page) drastic modification would have" sufficed and whether the modification was reasonable in light of changed circumstances. Id. at 30-32, 97 S. Ct. at 1521-1522, 52 L. Ed. 2d at 114-116.

Parcel 351 and thereby eliminated the sole source of security specifically pledged by state law for payment of bonded indebtedness. See Energy Reserves, supra, 103 S. Ct. at 704-705.

2) "Public purpose unjustified." The conservation of Lake Tahoe is not a "significant and legitimate public purpose which supports the impairment of petitioners' bond contract. " See Id. at 705. The streets and other improvements have already been placed on Parcel 351. The only additions would be necessary feeder lines and construction, all of which could be accomplished without adversely affecting the environment.

3) No reasonable adjustment of the contracting parties' rights. The land, which was essential to the payment and security of the petitioners' bond, was rendered worthless as a result of respondent CTRPA's unreasonable actions.

This drastic impairment of petitioners' contract rights was unnecessary.

Petitioners, as purchasers of municipal bonds, represent perhaps the most conservative of investors; they were willing to sacrifice higher yields because of the tax benefits which accompany this type of obligation, the almost absolute assurance of repayment and, in the meantime, the assurance of a liquid investment. Petitioners financed the public improvements to Parcel 351 all upon the market's understanding that the contractual undertakings between issuers and private investors are sacrosanct. The drastic and substantial impairment of petitioners' security could not have been contemplated at the time petitioners purchased their bond in 1971. Thus, the application of the respondent's subdivision restrictions to Parcel 351 completely defeated the expectations of

the parties under their bond contract. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed. 2d 727 (1978). The direct effect of the Ordinance was to eliminate payment of the bonded indebtedness.

The challenged ordinance (particularly when viewed in combination with the other continuing subdivision restrictions and sewer connection bans enforced by respondent's co-defendants in the Lake Tahoe area), constitutes an "oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security" in this case. W. B. Worthen Co. v. Kavanaugh, supra, 62, 79 L. Ed. at 1302(1935). It is difficult to imagine a clearer case of impairment of contract. 8/

8/ The Court of Appeal's conclusion that the Ordinance affected only the "property and not the legal obligations under the bonds" was based on an erroneous

(footnote continued)

Nevertheless, the Court of Appeal -- on the slender reed of res judicata -- approved the complete reversal of a hundred years of bond law and constitutional principles not only established by this Court but recognized

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(footnote continued from previous page) application of language derived from the case of Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency, 632 F. 2d 104 (9th Cir. 1980). Northwestern is distinguishable for the following reasons: (1) The land use ordinance challenged in Northwestern did not eliminate the bondholders' security, but only affected a right to a sinking fund, under Nevada law. See Northwestern Nat. Life Ins. Co. v. Jordan, 447 F. Supp. 856, 860 (D. Nev. 1978). In this case, the Calls' only remedy was to foreclose against Parcel 351 itself. (2) The subject land in Northwestern was not shown to be worthless. Only 243 acres of the plaintiff's 443 acre parcel was rezoned. Northwestern, supra, 632 F. 2d at 105. (3) The plaintiff in Northwestern did not contend that the challenged ordinance altered either the express terms of the bonds or the obligations of the parties to the bonds. Petitioners do, however, seek recovery on these grounds. (4) The Northwestern plaintiff did not bring suit on inverse condemnation grounds based on Furey v. City of Sacramento, 24 Cal. 3d 862, 157 Cal. Rptr. 684, 598 P. 2d 844 (1979).

by the Supreme Court of California, as well as the courts of many other states. 9/ The Court of Appeal unjustly barred petitioners from even attempting to recover monies lent in good faith pursuant to a duly adopted special assessment and agreement. Neither the trial nor the appellate courts engaged in the three-step analysis constitutionally required by the U. S. Trust case. Hence, at no time have any of the courts even considered whether respondent's elimination of the petitioner-bondholders security was justified as an appropriate exercise of the state's police power.

9/ Creighton v. Pragg, 21 Cal. 115 (1862); Shouse v. Quinley, 3 Cal. 3d 357, 45 P. 2d 70 (1935); Selby v. Oakdale Irrigation Dist., 140 Cal. App. 171, 35 P. 2d 125 (1934); McQuillan, Municipal Corporations, §§43.122 and 43.141, pp 691, 736 (citations thereto).

B.

Petitioners are entitled to recover damages for the taking of their security.

Petitioners acquired their security interest in Parcel 351 four years before the enactment of the Ordinance and eight years before they acquired title to their security. The core security provision for petitioners' bond was defendant Placer County's promise that the real property securing the bond could be subdivided for residential use and, hence, not rendered valueless by governmental action as is the present situation.10/ The acts of

10/ In U. S. Trust, supra, the United State Supreme Court suggested a parallel test for determining which contemporaneous state laws should be incorporated into a contract and, thus, protect the Contract Clause. After reviewing prior authority, the court characterized this test as a "particularized inquiry into the legitimate expectations of the contracting parties." Id. at 20, n. 17, 52 L. Ed. 2d at 108, n. 17. Was one of the Calls' "legitimate expectations" that the state would guarantee not to exercise its police power unreasonably so as to destroy completely the value of their security

(footnote continued)

respondent CTRPA and its co-defendants not only prohibited all reasonable and beneficial uses of Parcel 351, but then also denied access to all of the benefits derived from various public improvements which were constructed with the monies furnished by the petitioners. These improvements have already been built and are used by adjoining developed tracts. The effect of the Ordinance and continuing subdivision and other prohibitions[11/] is to restrict the use of Parcel 351 to open

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(footnote continued from previous page) without compensation? The answer must be yes.

11/ The past and continuing land use restrictions at Lake Tahoe prevent even the building of one house on Parcel 351's 30 acres of subdivision land. The Complaint alleges additional prohibitions on any residential use of the land, e.g. the sewer connection bans imposed by the California Regional Water Quality Control Board, Lahontan Region, and the North Tahoe Public Utilities District (CT pp. 9-10). In 1984, the plan of the Tahoe Regional Planning Agency, respondent's successor agency, extended the prohibition on subdivisions applicable to Parcel 351.

space, while leaving surrounding property free to enjoy the benefits of the public improvements constructed in the Kingswood West assessment district. Hence, respondent rendered Parcel 351 -- petitioners' security -- little more than a collection of public easements through which members of the public, and owners of adjacent tracts, run sewage, automobiles and utilities without compensation to the petitioners.

On the basis of these facts, the actions of respondent CTRPA and its co-defendants violated the following constitutional prohibitions:

1. The "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments ("takings" clause) of the U.S. Constitution by:

a. Taking petitioners' right to have their bond discharged through foreclosure

of the lien 12/ on the land. Thibodo v. United States, 187 F. 2d 249, 257 (9th Cir. 1951). 13/ It is apparent that the property rights in a bond arise not only from the lien on land, but also in the

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12/ Under California law, petitioners' street improvement bond was a lien on Parcel 351. Neary v. Peterson, 1 Cal. 2d 703, 37 P. 2d 82, 83 (1934). The lien for street improvement assessments "remains intact notwithstanding the sale of the property for delinquent taxes, the right of foreclosure on the bond can not be denied." Elbert v. Nolan, 32 Cal. 2d 610, 197 P. 2d 537 (1948) (Separate proceedings, establishing defendants as "owners" of the property based on titles correlative with respective tax liens, did not, destroy plaintiffs' rights flowing from bond liens to sue for partition); Monheit v. Cigna, 28 Cal. 2d 19, 168 P. 2d 965, 968-969 (1946).

13/ See El Paso v. Simmons, 379 U.S. 497, 533-534, 13 L. Ed. 2d 446, 85 S. Ct. 577 (1965) (Black, J., dissenting); Contributors to the Pennsylvania Hospital v. Philadelphia, 245 U.S. 20, 62 L. Ed. 124, 38 S. Ct. 35 (1917) (Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid). See also Louisville Joint Stock Bank v. Radford, 295 U.S. 555, 594-595, 55 S. Ct. 854, 865-866, 79 L. Ed. 1593, 1607 (1934) (property rights in a mortgage instrument).

maintenance of the security which makes the bond an acceptable investment for the rational investor.14/ Petitioners should, therefore, be entitled to seek damages in inverse condemnation for the taking of their security.15/

b. The denial of all use and "taking" of the special benefits of the public improvements for which petitioners

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14/ Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (the economic impact of government regulation of land, especially the degree to which state action "frustrates distinct investment-backed expectations, may form the basis for a finding of a 'taking.'" Id at 127, 98 S. Ct. 2660, citing Pennsylvania Coal Co. v. Mahon, 760 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

15/ In San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 636-661, 101 S. Ct. 1287, 67 L. Ed. 2d 551 (1981), an apparent majority of this Court held the opinion that damages are recoverable for inverse condemnation arising out of excessive regulation. Id at 633-634, 101 S. Ct. at 1294-1295 (Rehnquist, J. conc. op.). See Martino v. Santa Clara Valley Water District, 703 F. 2d 1141, 1148 (9th Cir. 1983).

paid.16/

As a general principle, a municipality cannot constitutionally require a private property owner to pay for public improvements except to the extent that the improvements directly benefit the property.17/ This Court has held:

> The exaction from the owner of private property of the cost of a public improvement in substantial excess of the

16/ In Furey v. City of Sacramento, 24 Cal. 3d 862, 873, 157 Cal. Rptr. 684, 690, 598 P. 2d 844 (1979), the California Supreme Court held plaintiffs were constitutionally entitled to legal relief as a result of paying special assessments for governmentally-initiated public improvements and being precluded from any realistic access to the benefits of those improvements by enactment of an open space ordinance. Id. at 873, 157 Cal. Rptr. at 690. This court also held that the defendant was obligated to refund the money paid for the sewer system which the ordinance had rendered useless to the land in question. Id. at 878, 157 Cal. Rptr. at 693.

17/ Assessments for special improvements are lawful in California only if the assessed property receives a special benefit that corresponds with the amount of the assessment. Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 681, 129 Cal. Rptr. 97, 99-100 (1976).

> special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation.
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> Norwood v. Baker, 172 U.S. 269, 279, 19 S. Ct. 187, 191, 43 L. Ed. 443 (1898).

This Court has reaffirmed this doctrine on numerous occasions over the years. 18/ The value of property and the rights protected by the 14th Amendment arise not from the mere possession of the property but rather from its use. Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979). Government cannot impose a benefit upon Parcel 351 and later

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18/ See, e.g., Myles Salt Co. v. Iberia Drainage District, 239 U.S. 478, 36 S. Ct. 204, 60 L. Ed. 392 (1915) (assessment for drainage district); Gast Realty v. Schneider Granite Co., 240 U.S. 55, 36 S. Ct. 254, 60 L. Ed. 523 (1915) (assessment paved streets); Georgia Railway & Electric Co. v. Decatur, 295 U.S. 165, 55 S. Ct. 701, 79 L. Ed. 1365 (1935) (holding error for trial court to refuse evidence on disparity between assessment and benefit to property).

unconstitutionally withdraw all practical access to that benefit.

c. Denial of the use of the improvements specifically benefiting Parcel 351 and the simultaneous public use of the same benefits constitutes uncompensated physical occupation of the property.

By denying the petitioners permission to subdivide and use the improvements to Parcel 351 (i.e. the compensation for relinquishment of the power to exclude others from Parcel 351),[19] CTRPA created a pure public use of the property. It thereby transformed what would have been permissible uses of the sewer lines, roads and other improvements into uncompensated,

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19/ The power to exclude has traditionally been considered "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, 444 U.S. 164, 176, 100 S. Ct. 383, 391, 62 L. Ed. 2d 332 (1979); see Restatement of Property §7.

open and continuing intrusions by the public. Public uses that involve uncompensated physical intrusions or seizures are unconstitutional under the takings clause of the Constitution.20/

2. Respondent CTRPA and its co-defendant agencies denied petitioners equal protection of the laws.21/ Respondent

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20/ See, e.g., Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-330, 43 S. Ct. 135, 136-137, 67 L. Ed. 287 (1922) (military use); Western Union Telegraph Co. v. Pennsylvania R.R., 195 U.S. 540, 567-571, 25 S. Ct. 133, 140-141, 49 L. Ed. 312 (1904) (telegraph lines); Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 U.S. 419, 429-430, 102 S. Ct. 3164, 3172-3173, 73 L. Ed. 2d 868 (cable television).

21/ Among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are rights to acquire, enjoy, own, and dispose of property. Lynch v. Household Finance Corp., 705 U.S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 429, reh. den. 406 U.S. 911, 92 S. Ct. 1611, 31 L. Ed. 2d 822 (1972). In the context of zoning, enforcement of an ordinance -- even if otherwise valid, violates equal protection if the ordinance is applied or enforced with discriminatory intent or purpose. See Snowden v. Hughes, 321 U.S. 1, 8, 64 S., Ct. 397, 401, 88 L.

(footnote continued)

"spot zoned" Parcel 351[22/] and thereby created an irrational and discriminatory distinction between Parcel 351 and surrounding tracts.

C.

The doctrine of res judicata should not be expanded to justify the violation of bondholders' constitutional rights.

Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979). The lower courts' expansion of this doctrine,

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(footnote continued from previous page) Ed. 497 (1944); Scudder v. Greendale, 704 F. 2d 999, 1002 (7th Cir. 1983).

22/ Under California law, one permissible basis for attacking the validity of a zoning ordinance is that the zoning ordinance is "spot zoning". Viso v. State of California, 92 Cal. App. 3d 15, 22, 154 Cal. Rptr. 580, 584 (1979). Spot zoning involves "unique treatment contrary to like property in the same general location." Westborough Mall, Inc. v. City of Cape Giradeau, 532 F. Supp. 284 (E.D. Mo. 1981)

to preclude bondholders from litigating their claims when their security has actually been rendered worthless, is inapplicable to this case for the following reasons:[23]

(a) The issues are entirely different.

Petitioners, unlike most litigants seeking to avoid the bar of res judicata, do not merely assert a new ground for recovery on the same cause of action. Significantly, they also do not attack the validity of the prior judgment against the landowners in the prior action of Call v. Feher. The petitioner-bondholders seek recovery for the harsh and unreasonable restriction of rights to a different subject property, i.e. their bond

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23/ See Blonder-Tongue Labs v. University Foundation, 402 U.S. 313, 323-324. 91 S. Ct. 1434, 28 L. Ed. 2d 788, 796-797 (1971) (litigants who never appeared in a prior action may not be collaterally estopped without litigating the issue).

investment.[24] (See supra, at A. and B.)

(b) Petitioners and respondent were never adverse parties in the prior adjudication.

Different parties from the prior action oppose each other in this case. In the prior action, petitioners were former co-defendants of respondent CTRPA and later complete strangers to the cross-complaint by the landowners. (see discussion re "procedural history," supra).

(c) The bondholders have never been in privity as "successors in interest" to the landowner-litigants from the prior action.

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[24] In addition to the impairment of contract and inverse condemnation claims, petitioner-bondholders' complaint also sought relief for (1) breach of contract and conspiracy to induce breach; (2) unjust enrichment; (3) estoppel; (4) for deprivation their vested development rights; (5) writ of mandate; (6) violation of equal protection; and (7) declaratory relief.

In this case, petitioners' rights are based upon their status as municipal bondholders, not real estate purchasers or successors in interest to the former landowners. Petitioners' rights at issue here were not obtained through contractual relations with the landowners.25/

Thus, contrary to the appellate court's assertion, petitioners did not

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25/ Petitioners perfected a right granted to them by virtue of a municipal bond with the County of Placer pursuant to the California Improvement Act of 1911 and the California Municipal Improvement Act of 1913. The applicable law and the equities applying to municipal bondholders are completely different from those applying to purchasers of real property. For example, petitioners' rights are based on an agreement with the governmental entity, not on a sales agreement. While a purchaser takes real property subject to all pre-existing liens, a bondholder who exercises his security rights, takes the property clear of all other private interests whether arising before or after the bond was issued. (Sts. & Hy. Code §6555) Moreover, there is no contractual relationship at all between the bondholder and the owner of the real property which is the security for the payment of the municipal bond. Call v. Feher, supra, at 445, 115 Cal. Rptr. at 392.

acquire "an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." (A6) (quoting Bernhard v. Bank of America, 19 Cal. 2d 807, 811, 122 P. 2d 892, 894 (1941) (emphasis added).26/ In fact, a bondholder's lien on a parcel of land has been held by the California Supreme Court to survive ownership of the land to which it attached. Wilson v. Beville, 47 Cal. 2d 852, 306 P. 2d 789, 791 (1957) (bondholder entitled to compensation for the taking of his security interest in

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26/ The bondholders' property interest was acquired before the commencement of the prior action in Call v. Feher and was concurrent with the landowners' interest. In any event, the ultimate transfer of title to Parcel 351 to petitioners was involuntary. Petitioners actually bid their bond during the public sale of the subject land. Title to Parcel 351 was transferred to petitioners only because there were no other bids for the worthless security.

condemned property).27/

The mischaracterization of the bondholder-petitioners as successors in interest denies them the opportunity to challenge the governmental invasion of their property interests. "Because res judicata may govern grounds and defenses not previously litigated, ... it is to be invoked only after careful inquiry." Brown v. Felsen, 442 U.S. 127, 132, 60 L. Ed. 2d 767, 772, 99 S. Ct. 2205 (1979). No published decision has held that a bondholder who takes title to land as a

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27/ In an analogous situation, a mortgagor's loss in litigation affecting the mortgaged property does not bind the mortgagee nor can the mortgagee bind the mortgagor. Chase National Bank v. City of Norwalk, 291 U.S. 431, 438, 54 S. Ct. 475, 78 L. Ed. 894, 899 (1934). "Neither party is allowed to jeopardize the security or ownership interests of the other through litigation any more than through conveyance, subsequent encumbrance, or like transactions." 18 Wright & Miller, Federal Practice & Procedure, §4461, p. 543 (1981). The foregoing principles should apply to special assessment bonds, since "similar security relationships are governed by the same rule." Id. at fn. 2.

result of an landowner's default on bond assessments is a "successor in interest." If this proposition is permitted to stand, virtually no bondholder could defend his rights to the value of his security in land. States would be free abrogate any security provision and impair any municipal bond secured by real property simply by imposing land use regulations on landowners.

(d) There has been no final judgment on the merits of petitioners claims.

As indicated previously (see "Statement of Case -- procedural history," supra), petitioner-bondholders' claims in this case (see fn. 24, supra.) were neither alleged nor litigated[28/] by any

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28/ In Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 671, 88 L. Ed. 376, 384, 64 S. Ct. 268 (1944) the Court stated:

> ...[W]here the second cause of action between the parties is upon a different claim the prior judgment is res judicata

(footnote continued)

of the parties in the prior action of Call v. Feher.[29] Moreover, this case is based on new facts that occurred after petitioners foreclosed on their security and attempted to recover their bond investment which altered their legal rights and relations to the defendant governmental agencies.

(footnote continued from previous page)
not as to issues which might have been tendered but only as to those matters in issue or points controverted, upon the determination of which the finding of the verdict was rendered."

[29] Call v. Feher held that the landowners could not have raised and litigated plaintiffs' potential claims against CTRPA. ("The only true contract is the bond between the issuing entity and the bondholder." Call v. Feher, supra, at 441, 155 Cal. Rptr. at 390.") Second, the landowners, had no special agreement or bondholder status with defendant Placer County to enforce. See e.g. Amador Valley Joint Unified High School District, etc. v. State Board of Equalization, 22 Cal. 3d 208, 242, 149 Cal. Rptr. 239, 255, 583 P. 2d 1281, 1297 (1978) (petitioners were not injured bondholders). Thus, the rights of the bondholders as against CTRPA were not even at issue in the prior action.

(e) The denial of a right to hearing in the context of this case is a violation of the due process process rights of bondholders.

The appellate court refused to face squarely the issues posed by petitioners' action and misapplied the res judicata doctrine. In effect, the lower courts held incorrectly that government can impair the bondholders' interests by simply litigating its land use regulations with landowners. To make the prior adjudication binding on petitioners would yield the absurd result of leaving all bondholders without a remedy or protection against the non-repayment of their bond. The preclusive effect of the judgment (against the landowners) in Call v. Feher raises serious due process questions.30/

30/ The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect

(footnote continued)

D.

The res judicata decision subverts the integrity of municipal finance.

There is no indication that the CTRPA gave any consideration to the effect that its ordinance might have on holders of special assessment bonds or the possibility of using alternative, less drastic means of accomplishing its goal

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(footnote continued from previous page) their property or as plaintiffs attempting to redress grievances. Logan v. Zimmerman Brush Co., 455 U.S. 422, 455, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265, 273 (1982). A state, moreover, may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement and without appropriate procedural safeguards. Id. at 434, 102 S. Ct. at 1157, 71 L. Ed. 2d at 276-277; See Vitek v. Jones, 445 U.S. 480, 490-491, n. 6, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980).

See also Boddie v. Connecticut, 401 U.S. 371, 380, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). (states prevented from denying litigants' use of adjudicatory procedures and an opportunity to be heard); Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) (constitutional limitations on the courts' power to dismiss an action without affording a party a hearing on the merits of his case).

(i.e., to balance the interests of the bondholders with the interests of the public). California and federal law condemn such conduct by public entities.31/ Nevertheless, the California courts uncritically approved the elimination of the bondholders' security. It, therefore, foreclosed irrevocably the possibility that petitioners protected, contractual expectations arising from the bond could be realized.

In this case, the effect of defendant CTRPA's subdivision moratorium is no less drastic than if the Ordinance had suspended the right to collect interest or principal when due. The enactment of the

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31/ See generally Thomas R. Hurst, "Municipal Bonds and the Contract Clause: Looking Beyond United States Trust Company v. New Jersey," 5 Hastings Constitutional Law Quarterly 25 (1978); Comment, "The Contract Clause: Is There Life After Death," 30 Baylor Law Review 191 (1978); Comment, "Alteration of Rights in California Public Securities," 53 California Law Review 1081 (1965).

Ordinance and its retroactive application to petitioners' security, constitutes a threat to the stability of the market for municipal debt obligations. The plenary power of the state does not extend to or include the right to "trench upon private rights arising out of or based on contracts." Sutter Basin, 40 Cal. 2d 235, 253 P. 2d 649, 652 (1953). Without the rigorous protection of minority rights, which the constitutional prohibition against the impairment of contracts provides, the security of the terms of public bond issues would be difficult to assure. Thomas R. Hurst, "Municipal Bonds and the Contract Clause: Looking Beyond United States Trust Company v. New Jersey" 5 Hastings Constitutional Law Quarterly 25, 26 (1978).

The political reluctance of state legislatures to raise taxes and the temptation to interfere with pre-existing

contractual obligations has been recognized by both the California and United States Supreme Courts.

> If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protections at all....[A] state cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors....[A] state is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a state is not free to impose a drastic impairment when an evident and more moderate course would service its purposes equally well.
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> United States Trust, supra. at 26, 29, 30 - 31, 97 S. Ct. at 1520 - 1522, as quoted in Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal. 3d 296, 152 Cal. Rptr. 902, 541 P. 2d 1 (1979)

To uphold the dismissal of this case on res judicata grounds would permit the

state -- under the guise of land use regulations -- to redefine the nature of any plaintiff's security provision as "non financial" and escape responsibility for its public bond obligations. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." United States Trust, supra. at 26, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112. The substantial deprivation or encroachment of valuable bond contract rights would hardly benefit states in the long run. Comment, "How Not to Contest Special Assessments in California," 17 Stanford Law Review, 256 (1965).

In sum, significant questions of law are posed by this unwarranted extension of the Call v. Feher decision. Call v. Feher never addressed the situation where government has breached its obligation not to substantially alter bondholders'

security so as to render it totally valueless. The rights of bondholders who take title by virtue of their liens on real property security must be clarified in view of the use of the Call v. Feher decision to bar bondholders' claims. Hence, petitioners should at least be permitted to prove their claims before a trial court.

There exists a need for a proper balance between the rights of bondholders and the public need for proper land use control. See Agins v. City of Tiburon, 24 Cal. 3d 266, 275-276, 157 Cal. Rptr. 372, 377 (1979), aff'd, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). Such a balance remains to be struck here.

The granting of relief to petitioners could help serve long range conservation goals and to "socialize the burden" on petitioners which should be borne by society as a whole. In the long run, Lake

Tahoe is more endangered by the philosophy of taking something for nothing than of paying for what is taken. If Parcel 351 is truly vital as open space at Tahoe, then it should be taken and paid for. If not (as petitioners are prepared to show), then it is patently unfair to charge petitioners with the double price of paying for the public facilities and for the open space. This approach only stirs up justified community resentments against "conservation" that sooner or later will expose Lake Tahoe to irreversible degradation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should

be granted.

Respectfully submitted,

NICHOLS, DOI & RAPAPORT,

ALAN H. NICHOLS
Counsel for Petitioners

APPENDIX A

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
IN AND FOR THE THIRD
APPELLATE DISTRICT
(Placer)

FILED
FEB 23, 1984
COURT OF APPEAL - THIRD DISTRICT
WILLFRIED J. KRAMER, Clerk

EVERARD C. CALL and BETH S. CALL,	)	3 Civ. 22759
Plaintiffs and Appellants,	)	(Super. Ct. No. 59255)
v.	)	
CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, et al.,	)	
Defendants and Respondents.	)	

Everard C. and Beth S. Call appeal from an order of the trial court sustaining without leave to amend the demurrer of California Tahoe Regional Planning Agency (CTRPA) to the Call's complaint. Such an order is nonappealable; appeal lies only from a subsequent judgment of dismissal. (6

Witkin, California Procedure, Appeal, §68, subd. (a), P. 4082.) However, it is obvious to us the trial court intended a final ruling, and CTRPA was entitled to an order of dismissal. As the Court of Appeal stated in Wilson v. Household Finance Corp. (1982) 131 Cal.App.3d 649, 651-652, "It would be a waste of judicial resources to require dismissal of the appeal, to be followed by the entry of an order of dismissal in the trial court and another appeal. In such circumstances it has been held the appellate court may modify the order to make it a judgment and construe the notice of appeal to apply to that judgment. (E.g., Nystrom v. First Nat. Bank of Fresno (1978) 81 Cal.App.3d 759, 763, 768 [146 Cal.Rptr. 711]; 6 Witkin, Cal. Procedure (2d ed. 1981 supp. to vol. 6) Appeal, §§49, 337, pp. 13, 54-55.)"

The Calls filed an extensive challenge

to CTRPA's ordinance restricting subdivision of the Call's 30-acre lot at Lake Tahoe. The trial court sustained CTRPA's demurrer on the ground the claims in the complaint were barred by the doctrine of res judicata, and specifically by the judgment in a prior action that we upheld in Call v. Feher (1979) 93 Cal.App.3d 434, referred to hereinafter as the prior action. We modify the order sustaining the demurrer to include a judgment of dismissal, and otherwise uphold the judgment of the trial court. The present action is barred by res judicata.

FACTS

Most of the pertinent preliminary facts we set forth in Call v. Feher, supra, 93 Cal.App.3d 434, 438-439. In that case, the Calls had filed an action to foreclose on a street improvement bond they purchased from Placer County in the

face amount of $98,867.54. (Id., at p. 438.) Payments on the bond were secured by a parcel of real property, parcel No. 351, a portion of the Kingswood West Assessment District in the Placer County section of the Lake Tahoe region. (Ibid.) The previous owners of the property claimed a CTRPA Land Use Ordinance restricting subdivision of that parcel resulted in commercial frustration of the object of the bond agreement, and thus excused their default in paying bond assessments. They also cross-complained against CTRPA. the Calls and Placer County, seeking a declaration that the affected property should have a vested right to effect a subdivision, and challenging the constitutional validity of the subdivision restrictions. (Call v. Feher, supra, 93 Cal.App.3d 434, 439-440.)

CTRPA filed a general and special demurrer to the cross-complaint, and the

trial court sustained the demurrer without leave to amend. Thereafter, the trial court granted the Calls' motion for summary judgment of foreclosure, and made an order of sale. (Id. at p. 438.) The trial court found the CTRPA Land Use Ordinance restricting subdivision was constitutionally valid, and that the previous landowners had no vested right to subdivide. On appeal in those actions, we consolidated the previous landowners' appeal from the judgment of dismissal arising from the sustaining of the demurrer and the appeal from the summary judgment on the bond foreclosure, and we affirmed the judgments of the trial court. (Id. at pp. 439, 446.)

Subsequent to that action, the Calls purchased the property at a sheriff's sale for $96,449.90, slightly more than the amount of the judgment plus interest ($95,455.11) in the prior action. The

sheriff's deed was recorded November 7, 1979. In March 1981 the Calls filed the present action in which they seek damages of $1.5 million, alleging the actions of CTRPA in enacting the land use ordinance prohibiting subdivision of the parcel "damaged, confiscated and took plaintiffs' real property. . . ." They complain the subdivision restriction impairs an alleged contract between them and the County arising from the bond purchase. Additional causes of action include claims for breach of express or implied contract, equitable estoppel, detrimental reliance, unjust enrichment, vested rights to subdivide, relief based on an alleged unconstitutional limitation of the Calls' use of the parcel, equal protection violations, and others. On February 2, 1983, the trial court found the Calls' entire action was barred by the doctrine of res judicata and the court did not

reach the other grounds upon which CTRPA challenged the complaint. The trial court sustained without leave to amend CTRPA's demurrer, and this appeal ensued.

DISCUSSION

We examine whether res judicata bars the Calls' action against CTRPA. Because the facts are undisputed and the appeal concerns solely questions of law, we may make a final determination in accordance with applicable principles of both statutory and common law. (Dunning v. Dunning (1952) 114 Cal.App.2d 110, 115; 5 Cal.Jur.3d, Appellate Review, §529, at pp. 220-221.)

"[R]es judicata gives conclusive effect to a former judgment in subsequent litigation involving the same controversy. (4 Witkin, California Procedure, Judgment, §147, p. 3292 (2d ed. 1971; emphasis in original.) The doctrine is embodied in Code of Civil Procedure section 1908,

subdivision (a)(2): "[T]he judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title . . . ."

In the prior action, the previous landowners complained the CTRPA ordinance restricting subdivision was unconstitutional, deprived them of a vested right to subdivide, destroyed the value of bond-financed improvements on the property, and resulted in a frustration and failure of consideration of the bond contract. As we have noted, the trial court rejected those claims, and we upheld the trial court in Call v. Feher, supra, 93 Cal.App.3d at p. 443.

The present action is a restoration of the same claim for relief advanced by appellants' predecessors in title, arising from the exact same harm alleged to have occurred in the prior action, i.e.,

inability to subdivide because of the CTRPA ordinance. The Calls reassert the same causes of action for vested rights, frustration of contract and declaratory relief that were conclusively decided against the former landowners of the same parcel.

The Calls assert this action is different, in part because it does not concern bondholders and the obligations of municipal bondholders. The facts do not support the assertion. A careful examination of the complaint indicates the claims against CTRPA are based on the effect of the ordinance on the property as owned by the Calls. Their claim that their vested rights are based on their contractual interests (none of which are clearly asserted), and not on common law property rights, is nonsensical at best. As bondholders, they had no rights to subdivide property that was security for

payments on the bond. As landowners they might assert such rights, but the Calls are precluded from doing so because their precedessors (sic) in the title litigated the issues and lost.

The Calls contend res judicata is inapplicable to the present action because it does not involve the same parties or persons in privity with them. We think the significant question here is whether there was sufficient privity between the previous landowners and the Calls, regardless of the Calls' status as parties or as bondholders in the prior action. The most common form of privity exists with successors in interest by title, as codified in Code of Civil Procedure section 1908, quoted above. A privy has been defined as "one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the

parties, as by inheritance, succession or purchase." (Bernhard v. Bank of America (1942) 19 Cal.2d 807. 811.) Since we hold the Calls are suing as landowners and not bondholders, they come to the present case in the shoes of the previous landowners who asserted the same challenges to the CTRPA ordinance and lost.

The Calls somewhat inconsistently maintain they sue as bondholders and yet admit their rights to sue CTRPA did not mature until they had obtained title to the land. their standing as bondholders in the prior action is immaterial to the question of the application of res judicata. They are currently the landowners and cannot re-litigate the same issues adjudicated against the previous landowners.

The Calls claim they acquired their interest in the property before the commencement of the prior action, and

thus, cannot be successors in interest within the meaning of Code of Civil Procedure section 1908, subdivision (a)(2). (See Holman v. Toten (1942) 54 Cal.App.2d 309, 314.) It is true the Calls obtained a security interest in the land prior to commencement of the prior action; however, they obtained ownership interest in the land subsequent to judgment in the prior action and now they assert claims which are the claims of landowners. Holman is inapposite because it concerns a party whose title to the property vested before suit was commenced. (Id., at pp. 314-315.) Therefore, the interest on which the Calls base their claims was acquired subsequent to the judgment in the prior action, not prior to its commencement, and thus, res judicata will properly apply.

We also examine the question of whether it is fair to identify the Calls

as successors in interest by title in light of the policy barring such persons from asserting the claims of their predecessors in title. "The question of fairness appears to be resolved in terms of whether a successor to the kind of property involved could reasonably have anticipated that it might have been the subject of a judgment of the type in question." (Rest. 2d, Judgments §43, com. a, at p. 7.) There is no question the Calls could have anticipated the judgment in the prior action; they were in fact parties in a different capacity, and they acquiesced in that part of the judgment which upheld the validity of the CTRPA ordinance in restricting subdivision of the parcel.

In this case, the land use ordinance affected only the property and not the legal obligations under the bonds. (Call v. Feher, supra, 93 Cal.App.3d at p. 434;

see Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency (9th Cir. 1980) 632 F.2d 104.) Nothing CTRPA did prevented the parties having obligations under the bond from completing their respective obligations. There is no controversy here as to the impairment of any contract or bond obligation. Each claim put forth by the Calls refers to the effects of the ordinance on the real property owned in fee by the Calls.

The Calls assert a number of legal theories for relief, including damages of $1.5 million for inverse condemnation, declaratory relief, infringement of contract, vested rights and others. However, in both the prior action and this one, the landowners asserted the same primary right, involving the same property and the same ordinance. As the trial court found, "both actions seek recovery for benefits denied by reason of the

devaluation of the subject property due to the enactment of the subject ordinance." The invasion of one primary right gives rise to but one cause of action. (Slater v. Blackwood (1975) 15 Cal.3d 791, 795.) Once injury gives rise to only one claim of relief, regardless of whether different legal grounds for relief are presented. (Ibid.) As the trial court in the instant case noted: "Although the cross-complaint in the prior action and the complaint in the pending action both seek different remedies for the stated harm [declaratory relief in Call v. Feher; damages in the present], they each allege a violation of the right to be free from unjust or unreasonable restrictions that affect property rights." The reasoning of the trial court is correct.

Res judicata not only settles issues actually litigated in the prior action, but also all issues that might have been

raised and litigated in the action. (Mattson v. City of Costa Mesa (1980) 106 Cal.App.3d 441, 446.) Fairness does not demand we ameliorate this doctrine, since the Calls were parties in the prior action and they had opportunity to litigate certain issues, file cross-complaints, or take other measures to protect their interests. Clearly, they had more such opportunity than a purchaser who, even with knowledge of the prior action, was not a party to it.

The order is modified to include a judgment of dismissal. As modified, the judgment is affirmed.

REGAN, Acting P. J.

We concur:

EVANS, J.

BLEASE, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

Date: February 2, 1983, Department 2
Present Hon. J. Richard Couzens, Judge
Sharyn Veiga, Deputy Clerk

EVERARD C. CALL and BETH S. CALL,	)	
Plaintiffs,	)	No. 59255
v.	)	
CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, et al.,	)	
Defendants.	)	

Nature of Proceedings: Demurrer

MINUTE ORDER

Defendant CTRPA has interposed a multifaceted demurrer to the complaint. Without reaching all of the issues raised by the demurrer, the Court concludes that the present action must be barred by the doctrine of res judicata. Both sides have extensively briefed and discussed the law potentially applicable to these proceedings. The Court finds that the claim asserted in the action of Call vs.

Feher, resulting in the appellate decision reported at 93 Cal.App.3d 434, was the same primary right as asserted in the present action. Both actions involve the same ordinance adopted by defendant and both actions seek recovery for benefits denied by reason of the devaluation of the subject property due to the enactment of the subject ordinance. Although the cross-complaint in the prior action and the complain in the pending action both seek different remedies for the stated harm, they each allege a violation of the right to be free from unjust or unreasonable restrictions that affect property rights. Assuming the application of the doctrine of res judicata to the present proceedings, the doctrine will not only settle issues that were actually litigated in the prior action, but also all issues that might have been raised and litigated in the action. Mattson vs. City

of Cost Mesa (1980) 106 Cal.App.3d 441, 446. Accordingly, the slight variation in approach between the two actions is not dispositive.

Plaintiff contends that res judicata is inapplicable to the present proceedings since the present case does not involve the same parties or persons in privity with them. Code of Civil Procedure §1910 defines like parties as those who "were on opposite sides in the former case". An exception to this rule lies where the parties are actually opposed to each other and litigate issues adverse to each other. See Pomona College vs. Dunn (1935) 7 Cal.App.2d 227. It is quite true that in the prior action Call and CTRPA were co-defendants in the cross-complaint. In actual fact, however, the parties did not have a unity of interest. A finding of the validity of the CTRPA ordinance would be adverse to the interests of cross-

defendant Call. In this context, Call and CTRPA were actually antagonistic to each other in the prior action and are certainly antagonistic to each other in the present action.

Even if the parties to the present action were not actually adverse in the previous action, the principles of res judicata may still apply if there is sufficient privity between the parties. The most common form of privity exists with successors in interest, as in the subsequent acquisition of property previously subject to litigation. Dillard vs. McKnight (1949) 34 Cal.2d 209; Bernhard v. Bank of America (1942) 19 Cal.2d 807. Although plaintiffs argue that no privity exists by reason of their different standings in the two lawsuits (bondholders vs. property owners) and that their interest was acquired prior to judgment in the previous action, the

argument ignores the simple fact that they are bringing the present action as a successor to the title of the property in question and that a judicial decision has been made regarding the property in a previous action. They are, in fact, in privity with the prior landowner. Recent case law has expanded the concept of privity so as not to require actual identity of the parties but to include consideration of the practical realities of the situation. "The question is whether the non-party is sufficiently close to the original case to afford application of the preclusion." People ex rel. State of California vs. Drinkhouse (1970) 4 Cal.App.3d 931, 937.

In order for the doctrine of res judicata to apply, the prior litigation must have been resolved on the merits. The question involves a factual determination if the previous case was

resolved by demurrer. Plaintiffs assert that the prior case was resolved by the Appellate Court determining that the cross-complaint in the prior action should be dismissed for failure to exhaust administrative remedies. Plaintiffs' interpretation of the appellate decision is unreasonably restrictive. It is true that the Court did hold that the plaintiffs had not exhausted their administrative remedies. The appellate court also held, however, that the second amended cross-complaint did not allege a proper cause of action for declaratory relief; that there was no vested right to subdivide the property; that although imposition of the land restriction may have devalued the property, the obligations under the bond were not relieved; and that the doctrine expressed in Eldridge vs. Burns (1978) 76 Cal.App.3d 396 did not apply. The effect of the

ultimate determination by the Appellate Court was to resolve the case on its merits.

For the foregoing reasons, defendant's demurrer is sustained without leave to amend.

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

3rd District, Civil No. 22759

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
MAY 23, 1984
Laurence P. Gill, Clerk

IN BANK

CALL et al.

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY et al.

Appellants' petition for hearing DENIED.

The request for an order directing publication of the opinion in the above entitled cause is DENIED.

Bird, Chief Justice

APPENDIX B

CALIFORNIA TAHOE
REGIONAL PLANNING AGENCY

LAND USE ORDINANCE

****

Section 5.13 Residential Subdivision, Lot Splitting and Parcel Division Restriction

The Agency shall not consider or approve any proposal for subdivision, minor subdivision, lot split, or parcel division for residential development except that minor subdivisions and lot splits may be considered if they do not increase density or coverage from that which would be authorized in the absence of the split. The criteria for terminating this restriction include a requirement that the Agency make findings that

(a) 85% of the vacant parcels of record as of August 29, 1975, within the

subregion have been utilized for the construction of at least one dwelling unit or allowable commercial structure. Furthermore, once the 85% build out level has been attained, before any subdivisions, PUD's or any other residential development except a single family house on any existing lot or parcel of record can be approved, findings must be made by the Agency that any such approvals would be consistent with the environmental constrains of the region , and that the goals of the land capability, water quality, air quality, and scenic beauty elements of the land use plan, the goals of the transportation, conservation, and public services and facilities plans, have been attained, and will be maintained if further subdivision is authorized.

In addition, if the subdivision restriction be terminated, the Agency shall require, among other things, that:

The residential development authorized be confined to a minimum portion of the parcel authorized for development, to keep impervious surface coverage, land and vegetation disturbance, and roads and sewers to a minimum.

(b) The planning subregions for purposes of this policy are as follows:

Subregion #1. Northshore, including all of the CTRPA jurisdictional area north of the TTSA southern boundary.

Subregion #2. Southshore, including all CTRPA jurisdictional area south of the TTSA boundary.

(c) For purposes of this policy, a parcel is defined as any vacant legal parcel of record as of August 29, 1975 which is more than 2,500 square feet in area. Parcel expressly includes, but is not limited to, any vacant legal lot which is located within a residential subdivision as of August 29, 1975.

(d) An inventory/census of vacant parcels as defined above will be established by the CTRPA staff and will be revised every two years for purposes of making necessary determinations.

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